Supreme Court, U.S.
FILED
MAR 26 1993
OFFICE OF THE CLERK

No. 92-1237

In the Supreme Court of the United States

OCTOBER TERM, 1992

PHILLIP LEE HULL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In this case, an injured minor recovered against the government under the Federal Tort Claims Act. The question presented is whether the court of appeals correctly held that the district court can order an award in the form of a trust that will revert to the government upon the death of the minor, when the minor requests such an award through his legal representative and the district court finds that such an award would be in the minor's best interest.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 971 F.2d 1499. The first opinion of the district court (Pet. App. A29-A49) is unreported. The unreported opinion of the district court on remand is reproduced for the convenience of the Court in an appendix, *infra*, 1a-6a.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1992. A petition for rehearing was denied on October 22, 1992. Pet. App. A27. The petition for a writ of certiorari was filed on January 19, 1993. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Phillip Lee Hull (Lee) was born on June 28, 1987, at Claremore Public Health Service Indian Hospital in Claremore, Oklahoma. As a result of government negligence before and during his delivery, Lee suffered brain damage and other injuries. Lee's parents (the Hulls) brought suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. The government conceded liability, and the case proceeded to trial on the issue of damages. After a two-week trial, the district court awarded Lee $8,164,063.87. With the Hulls' agreement, the court ordered that Lee's damages be paid directly to a third-party trustee for Lee's benefit during his lifetime. The court also awarded a total of $250,000 to the Hulls. Pet. App. A3-A5, A29.

b. On the government's motion, the district court had appointed a guardian ad litem early in the litigation "so as to protect Phillip Lee Hull during the pendency of this action." Gov't C.A. Reply Br. 2 (quoting district court order). The court expressed concern that Lee's safety would be in jeopardy if the Hulls stood to receive the unspent portion of Lee's award upon his death. See Pet. App. A4, A7. The district court stated that "the real issue here is what is [in] the best interest of Phillip Lee Hull. If I had the power I would make every dollar awarded reversionary [to the government upon Lee's death]." Gov't C.A. App. 177A. The court did not create such a

reversionary trust, however, because it concluded that it lacked the authority to do so. Pet. App. A6-A7.

2. Although in the district court the government had not requested that the award be structured in any particular way, on appeal the government argued that the district court had the power to create a fully reversionary trust for Lee.[1] Lee's guardian ad litem supported the government's position that a fully reversionary trust was in Lee's best interest. See Pet. App. A6; Lee C.A. Br. 8-12.[2] In the court of appeals, Lee's legal representative reiterated her belief that "if the full trust comes to the parents of Phillip Lee Hull upon his death, * * * his life would be in serious jeopardy." Lee C.A. Br. 8.[3] The court of appeals noted that "the district judge apparently shared this concern." Pet. App. A6. The court of appeals found, however, that the award ordered by the district court "would not provide an incentive against Lee's untimely death while in the care of his parents," because "the entire remaining amount of the

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[1] The appeal also involved several other issues, none of which is presented in the petition for a writ of certiorari.

[2] "Lee C.A. Br." refers to the brief filed on Lee's behalf in the court of appeals by Judith A. Finn, who was appointed by the district court as Lee's guardian ad litem.

[3] The guardian ad litem supported her conclusion with sealed affidavits, which the district court found "raise[d] serious concerns as to the welfare of Phillip Lee Hull." Gov't C.A. Reply Br. 3 n.2 (quoting statement of district judge in open court). Although the court ultimately found it unnecessary to rely on the affidavits, the informed judgment of the guardian ad litem was properly taken into account by the court of appeals. See *ibid.*

damage award would go to the parents." Pet. App. A5 n.2.

As the court of appeals put it, "it would be incongruous for the recovery to place the victim's life in jeopardy." Pet. App. A9.[4] The court therefore concluded that the district court had the authority to approve an award whereby Lee's damages would be paid into a trust that would revert to the United States upon Lee's death. Pet. App. A10. The court of appeals vacated the judgment of the district court and remanded the case to allow the district court to consider whether such a trust would be in Lee's best interest. *Ibid.* This petition is from that decision of the court of appeals.

3. On remand, the district court imposed a trust identical to the one to which the Hulls had earlier agreed, with the exception that upon Lee's death any remaining funds will revert to the government rather than being paid to the Hulls. See App., *infra*, 3a.[5] The district court stated that "[t]he Trust * * * will be fully reversionary pursuant to 28 U.S.C. §1346

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[4] The government does not suggest or imply that the Hulls would intentionally harm Lee. The accident left Lee a spastic quadriplegic, however, and he will require extensive medical attention for the rest of his life. See Pet. App. A30-A31; Gov't C.A. Br. 3. Caring for such a child would strain many families, and the availability in the event of Lee's death of more than $8 million to the Hulls (who have experienced serious marital and alcohol problems) may produce conflicting pressures that could lead to less than optimal care for Lee. See Gov't C.A. Br. 12.

[5] The district court's decision was filed on February 16, 1993 (see App., *infra*, 1a), after the petition was filed in this Court.

because this Court specifically finds that arrangement will be in Lee Hull's best interest." *Ibid.*

ARGUMENT

1. Regardless of the merits of the question presented, this case does not warrant review for two independent reasons.

a. The petition names Phillip Lee Hull as the petitioner. See Pet. ii (List of Parties). Lee, however, has been represented by a guardian ad litem throughout this litigation. See Gov't C.A. Reply Br. 1 n.1. The guardian ad litem was a party to the action in the court of appeals and supported the government's position on the question presented in this petition. See Pet. App. A6. As the court of appeals recognized: "Lee agreed through his legal representative that it would be in his best interest for the government to place his damages, which totalled over eight million dollars, into a fully reversionary trust; in fact, he requested such an arrangement through his legal representative." Pet. App. A11. Because Lee was not aggrieved by the decision below, he should not be considered the petitioner in this Court. Cf. *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) ("the successful party below has no standing to appeal").

In the courts below, the Hulls opposed both the government and Lee's legal representative as to the form of the trust.[6] While it is true that "any party"

[6] The structure of his damage award is a matter between Lee and the government. Although the issue was not raised in the court of appeals, it is therefore questionable whether the Hulls even had standing to contest the form of Lee's award.

may file a petition for a writ of certiorari (28 U.S.C. 1254(1)), the Hulls' only interest in the form of the trust is their access to the money if Lee dies before the damage award is spent. The Hulls have been fully compensated for their own injuries. As the court of appeals correctly stated, "[t]he [challenged] award is to compensate Lee, and Lee only. Thus, the possibility that [the Hulls] might succeed to Lee's award is not relevant." Pet. App. A10. This Court should decline to consider the Hulls' request to review the disposition of property in which they have at most a contingent future interest,[7] particularly where (as here) the real party in interest with respect to the property has agreed to the challenged disposition.

b. In any event, the Hulls' contention (Pet. 5-11) that the court of appeals erred in concluding that the district court had authority to create a reversionary trust for Lee's benefit is not ripe for review. As the Hulls recognize, the trust originally created by the district court "[did] not contain a provision which [would cause] a reversion to the Government upon the death of Lee Hull." Pet. 4 n.1. While the district court recently approved a reversionary trust, that judgment is not final and appeals may still be taken. Following the disposition of any further appeals, it is possible that the Hulls will be satisfied with the outcome or that they will have other claims to raise.

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[7] The district court has since divested the Hulls of even that interest in the damage award. See App., *infra*, 3a. If they decide to pursue an appeal, the court of appeals should have the opportunity in the first instance to determine whether the Hulls even have standing to object to the form of the trust created for Lee's benefit.

This Court should accordingly follow its usual practice and deny the interlocutory petition for a writ of certiorari. *American Constr. Co.* v. *Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893); see also *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

2. On the merits, the decision below is correct, and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

a. The Hulls erroneously argue (Pet. 6-9) that the decision below conflicts with *Reilly* v. *United States*, 665 F. Supp. 976 (D.R.I. 1987), aff'd in part and rev'd in part on other grounds, 863 F.2d 149 (1st Cir. 1988); *Andrulonis* v. *United States*, 724 F. Supp. 1421 (N.D.N.Y. 1989), aff'd in part and rev'd in part on other grounds, 924 F.2d 1210 (2d Cir.), vacated *sub nom. New York State Dep't of Health* v. *Andrulonis*, 112 S. Ct. 39, reinstated, 952 F.2d 652 (2d Cir. 1991), cert. denied, 112 S. Ct. 2992 (1992); *Frankel* v. *Heym*, 466 F.2d 1226 (3d Cir. 1972); and *Nemmers* v. *United States*, 795 F.2d 628 (7th Cir. 1986). Those cases hold that in making FTCA damage awards, courts are limited to ordering the government to pay a lump-sum judgment.

The court of appeals in this case had no quarrel with the *Frankel* line of cases. See Pet. App. A9 ("We agree that courts cannot subject the government to ongoing obligations like the continuing payments proposed in *Frankel*."). The court simply held that so long as the government "satisfies its *obligation* up

front in one lump sum, nothing in the FTCA prohibits courts from exercising their inherent authority to structure awards or to impose trusts or reverter conditions to ensure that the damage recovery is in the best interest of the victim." *Ibid.* That holding does not conflict with any of the cases cited by the Hulls.

Frankel, which is the "seminal case on this topic" (Pet. App. A8), identified two concerns underlying the lump-sum rule. One is that continuing payments would require continuing judicial supervision. 466 F.2d at 1229. That concern is not implicated in this case: The award included an amount for fund management, see Pet. App. A35, to which the government does not object. The second concern identified in *Frankel* is based on the FTCA's being a waiver of sovereign immunity: "If novel types of awards are to be permitted against the government, Congress should affirmatively authorize them." 466 F.2d at 1229. That concern is also not implicated in this case, because Congress has specifically authorized "money damages" in FTCA cases, see 28 U.S.C. 1346(b), and the United States has consented to the entry of an order establishing a reversionary trust. No sovereign immunity issues are involved if the parties agree, after the government pays the lump sum out of the federal treasury, to structure the award as a reversionary trust (or, for that matter, in any other way).

The court's decision is entirely consistent with the First Circuit's observation that "[a]fter the wrongdoer and its funds have been parted, the focus shifts: it cannot be doubted that the [district court] has the

power (1) to ensure that the recovery benefits the victim, and (2) to exercise strict supervision over investment and use of the funds if the victim is a legal incompetent or otherwise in need of protection." *Reilly*, 863 F.2d at 170. As the court of appeals noted, the Seventh Circuit has in dictum approved reversionary trusts under certain circumstances. See Pet. App. A12 (citing *Nemmers*, 795 F.2d at 636 n.4). Moreover, "[i]n FTCA cases with similar facts, two district courts have imposed trusts granting a reversionary interest to the government with the consent of the real party in interest." Pet. App. A11 (discussing *Robak* v. *United States*, 503 F. Supp. 982 (N.D. Ill. 1980), aff'd in part and reversed in part on other grounds, 658 F.2d 471 (7th Cir. 1981), and *Reilly*, *supra*, 665 F. Supp. 976).

Lee, the injured tort victim, is the real party in interest with respect to the damage award. See Pet. App. A10. As the court of appeals noted, "Lee consented to a fully reversionary trust through his legal representative, the guardian ad litem." *Ibid.* The Hulls object that they, as Lee's parents, should have control over the disposition of the award. See Pet. 9 n.8. The court of appeals properly rejected that contention: "Because the guardian ad litem—and not the parents—represents Lee, [the guardian's] consent is the relevant consideration. The parents' refusal to consent to a fully reversionary trust is irrelevant, particularly in light of their alleged conflict of interest in this case." Pet. App. A11 (citation omitted). The Hulls concede (Pet. 9) that FTCA plaintiffs can agree to the formation of a reversionary trust; because Lee agreed to such a

trust through his legal representative, the Hulls' objection to the form of the award is meritless.

b. The Hulls also state that the decision of the court of appeals "appears to conflict with the prior decisions of this Court." Pet. 10. First, they claim that the court of appeals disregarded this Court's decisions by construing the FTCA to grant courts broad authority to fashion equitable relief. The decisions cited by the Hulls, see Pet. 10-11 (citing *Kosak* v. *United States*, 465 U.S. 848 (1984), and *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955)), however, have no bearing whatsoever on the precise issue in this case: whether the district court has authority to create a reversionary trust where the United States and the victim agree that such a trust is appropriate and desirable. Second, the Hulls erroneously suggest that the award in this case contradicts the principle that the FTCA places the government in a position analogous to that of a private tortfeasor. See Pet. 11 (citing *Feres* v. *United States*, 340 U.S. 135 (1950), and *Dalehite* v. *United States*, 346 U.S. 15 (1953)). They fail to identify, however, any case in which a court of appeals has held that a tort victim could not agree with the tortfeasor to create a reversionary trust, and we have found none.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1993

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
OKLAHOMA

No. 88-C-1645-E

PHILLIP LEE HULL, a minor, by his natural parents, guardians and personal representatives, PHILLIP GENE HULL AND TANYA LEE HULL, husband and wife, and PHILLIP GENE HULL, Individually, and TANYA LEE HULL, Individually, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant.

THIRD AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed February 16, 1993

This Third Amended Findings of Fact and Conclusions of Law is entered this 12th day of February, 1993, amends and supersedes the Second Amended Findings of Fact and Conclusions of Law entered herein on the 28th day of October, 1992 in response to the August 10, 1992 mandate of the United States Court of Appeals for the Tenth Circuit. Following the Tenth Circuit remand, the parties have fully briefed and discussed the remaining issues with the Court. The case is now in a posture for resolution of those issues.

In its August 10th Order the Circuit addressed four issues:

> 1. The power of this Court to establish a full reversionary Trust;
>
> 2. The date upon which interest on the award should begin to accrue;
>
> 3. Whether the guardian ad litem's fees are "attorneys fees" (deductible from the award) or costs (taxable to the government);
>
> 4. The appropriateness of certain specific damage awards; to-wit:
>
> > a. economic losses (lost wages, earning capacity; medical treatment; special housing and transportation);
> >
> > b. non-economic losses (loss of enjoyment of life; mental and physical pain; disfigurement; permanent disability);
> >
> > c. parents' loss of services; aid, comfort, society and companionship.

The Court will address each issue *ad seriatim* and, to the extent that its conclusions do not conflict with those of this Order, the Court's April 12, 1991 Order (Amended Findings of Fact and Conclusions of Law) is incorporated herein and made a part hereof.

1. *Form of the Trust*

The Court declines to adopt the government's proposal for a U.S.A./Grantor Trust pursuant to the terms of a structured settlement. Absent the availability of hard figures (*see*, Order of September 9, 1992, at docket #181) the Court is somewhat reticent about concluding that the government's proposal

would work to Lee Hull's net benefit.[1] The Court is also concerned, in these uncertain times, about the long-term reliability of a casualty carrier.[2] The Court will, therefore, affirm its April 12, 1991 Order establishing and [*sic*] irrevocable Trust for Lee Hull under the provisions set forth therein; provided, however, that the Trust shall be fully reversionary upon the death of Lee Hull. The Trust, then, will be fully reversionary pursuant to 28 U.S.C. §1346 because this Court specifically finds that arrangement will be in Lee Hull's best interest.

The Circuit also asks the Court upon remand to consider 1) whether minor changes in the Trust might dissipate any tension between Lee Hull's interests and those of his parents; 2) whether there should be a provision of reimbursement to the Indian

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[1] See, e.g., The government's submission of Information Regarding Advantages of a Structured Settlement, docket #187, especially, M. Feldheim's article at p. 296:

> Knowledge of cost is essential not just for fee calculation purposes but to ensure that the settlement is reasonable under the circumstances so as to avoid any possible claim of legal malpractice. This is particularly true where claims on behalf of minors and decedents' estates require court approval. The present value or cost is a critical fact that any court approving a compromise should know.

[2] See, e.g. The Government's Submission, docket 187, especially the article entitled "Structured Settlements: An Ounce of Prevention: Some Dos and Don'ts" from *Trial*, December 1988:

> The number-one "don't" is don't rely on the annuity company in a settlement like this. No matter how large and solid the company, if Fly-By-Night Leasing owns the annuity, your client is at the mercy of Fly-By-Night. If you cannot rely on the defendant or its casualty carrier, not just now but into the distant future, never settle a case like this on a structured basis.

Health Service for services rendered to Lee in the future; and 3) whether a new guardian ad litem should be appointed. The Court has considered these issues and now finds that:

1. Parents aver no tension exists between the respective interests; therefore no accommodation needs to be made;

2. In light of the history of this case, the Court does not feel that Plaintiffs should be required to use the Indian Health Services;

3. Pursuant to the terms of the Trust no guardian ad litem is required.

2. *Accrual of Interest*

The Circuit found that this Court's Nunc Pro Tunc Order of June 5, 1991 was the first document to satisfy the final judgment requirements of Rule 58 Fed.R.Civ.P. Post judgment interest, then, accrues from that date at the rate of 6.09% per annum to the date of deposit by the government to Fourth National Bank of Tulsa as Trustee.

3. *Guardian Ad Litem Fees*

The Court has reviewed the records and has determined that the services of the Guardian ad litem in this litigation primarily involved looking after the interests of Lee Hull (indeed, that was the purpose of the appointment from its inception); therefore her services as an officer of this Court should be taxed as costs against the government pursuant to Rule 54(d) Fed.R.Civ.P.

4. *Specific Items of Damages*

A. *Life Expectancy:*

The Court agrees that a scrivner's [*sic*] error appears at Finding No. 11, pp. 3-4 of the Court's April 12, 1991 Order and hereby specifically finds that Lee Hull's life expectancy is 72.8 years.

B. *Discount Rate*

No discount rate should be applied to medical services and equipment or to lost wages damages. (See attached affidavit of Dr. Roger Bey regarding the investment provisions of the Guardian ad litem's Proposed Trust Document at docket #186). Further, while any differential between the investment rate and the inflation rate could support a finding favoring application of a discount rate, it is this Court's view that when the impact of future taxes if [*sic*] factored in, no differential is likely to exist; wherefore parity can be assumed. (*See* Dr. Roger Bey's affidavit, *supra*; *see also Barnes v. United States*, 685 F.2d 66, 78 (3rd Cir. 1982). The Court need not modify its computation in this regard.

C. *Findings Regarding Remaining Damage Claims denied by this Court*:

1) specialized adaptive housing;
2) personal services rendered by Mrs. Hull;
3) housekeeping services required by Lee;
4) lost household services;
5) physical disability and disfigurement;
6) past medical expenses; and
7) dental expenses.

1) no additional award is required for specialized adaptive housing because it was provided for in the awards for medical and life care expenses. *Miller v. United States*, 901 F.2d 894, 896-97 (10th Cir. 1990);
2) Similarly, it would be duplicative to make an additional award to Mrs. Hull whose services are reflected in awards for Lee's care and for Mrs. Hull's pain and suffering;
3) Housekeeping services are likewise covered by awards to provide for Lee's care;

4) The Court finds that household services performed by a child are too speculative to reduce to calculation; therefore the Court declines to make an award for lost household services;
5) Damages for physical disabilities and disfigurement were subsumed within the award for pain and suffering;
6) Plaintiffs have previously been reimbursed for past medical expenses insofar as they made proper application for the same to the Indian Health Service. The record indicates there is no evidence upon which to supplement the previous reimbursements.
7) Provision has been made for future dental expenses in the Court's award for future medical expenses.

The Court adopts the Agreed Statement of Damage Awards submitted on the 30th day of November, 1992 (docket #200). A copy is attached hereto for reference and made a part hereof.

So ORDERED this 12th day of February, 1993.

/S/_____
JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT